BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KEITH P. VONFELDT	)	
Claimant	)	
VS.	)	
	)	
I.F.R. AMERICAS, INC.	)	
Respondent	)	
AND	)	
	)	Docket No. 186,455
GRANITE STATE INSURANCE COMPANY	)	
AMERICAN INTERNATIONAL SOUTH INS. CO.	)	
ST. PAUL FIRE & MARINE INS. CO.	)	
Insurance Carriers	)	
	)	
AND	)	
	)	
THE STATE OF KANSAS	)	
WORKERS COMPENSATION FUND	)	

ORDER

Respondent and one of its insurance carriers (Granite State Insurance Company) requests review of the July 29, 2004 Post Award Order entered by Administrative Law Judge (ALJ) John D. Clark.

APPEARANCES

Terry J. Torline of Wichita, Kansas, appeared for claimant. Richard J. Liby of Wichita, Kansas, appeared for respondent and St. Paul Fire and Marine Insurance Company (St. Paul). Richard L. Friedeman of Great Bend, Kansas, appeared for respondent and Granite State Insurance Company and American International South Insurance Company (Granite). And Crystal M. Nesheim of Wichita, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

RECORD AND STIPULATIONS

Claimant's Application for Post Award Medical Treatment and Request For Attorney Fees was filed April 30, 2004 and heard by the ALJ on June 17, 2004. The ALJ did not list the record he considered in connection with this post award proceeding. The record before the Board includes the transcripts of the June 17, 2004 Post Award Hearing, the April 2, 1998 Preliminary Hearing and the August 23, 1994 Preliminary Hearing together with the pleadings and other documents contained in the administrative file.

Respondent's appeal brief contains references to testimony allegedly contained in a Discovery Deposition of Keith P. VonFeldt but there is no transcript of a discovery deposition in the administrative file. The Board does find a verbal stipulation to include a discovery deposition in the record of the hearing.

> Mr. Torline: Your Honor, the deposition of Mr. Vonfeldt was taken last Friday, although I haven't seen the transcript I am sure it will be here any day, and I think the parties are all in agreement that rather than covering a lot of ground here today that was covered back Friday, that we would be willing to allow you to read the transcript of that deposition and utilize it in making your determination today. Would that be true?
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> Mr. Liby: Yes.
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> Ms. Nesheim: Yes.
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> Mr. Friedeman: Yes. Your Honor, it might be somewhat helpful, since it was a lengthy deposition and the preliminary portion [sic] were certainly in the nature of discovery, if somebody on the defense side of this, and maybe the claimant's side, would all wish to do the same thing, could write you a memo and point out what we thought were the more salient portions of the deposition.
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> The Court: All right. Anything else for this morning's purposes? [1]

The ALJ's Order does not list nor refer to a discovery deposition of claimant. The docket report maintained by the Division of Workers Compensation does not show that a transcript of a deposition of claimant was ever received nor filed. Thus, the ALJ apparently did not consider claimant's discovery deposition testimony, and therefore, neither can the Board. "The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."[2]

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[1] P.A.H. Trans. at 7 and 8.

[2] K.S.A. 44-555c(a).

ISSUES

In his July 29, 2004 Order, Judge Clark authorized Roger Thomas, D.O., as claimant's treating physician and authorized Dr. Thomas to refer claimant to a specialist for his arm and neck problems. But the ALJ denied treatment of claimant for depression. The matter of post award attorney fees was reserved for a future hearing and determination.

In its Application for Review, Granite contends that claimant's present condition and need for treatment arose from a new injury.

St. Paul argues that an Agreed Award entered on March 17, 1995 for claimant's bilateral upper extremities should be upheld and further that claimant has sustained a new injury and an aggravation of his preexisting condition. Respondent requests that the July 29, 2004 Order be reversed and claimant be required to continue with the new claim (Docket No. 1,017,566) filed against respondent and its current insurance carrier Pennsylvania Manufacturers Association Insurance Company.

Claimant argues that the ALJ order should be affirmed. And that claimant's neck and arm injuries are a direct and natural consequence of his original injury and not a new injury.

The Fund did not submit a brief to the Board. Therefore, its position is not known.

The only issue for the Board's review is did claimant suffer a new and distinct injury or is his current condition a natural consequence of the compensable work-related injury suffered in this docketed claim?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant began working for IFR Americas, Inc., in 1988. Claimant's job entailed building avionic test equipment. This included calibrating, testing and troubleshooting the equipment. Claimant’s current position is senior final testing and measurement technician. Claimant’s job position is the same now as it was in 1990.

Claimant's bilateral upper extremity problems began in 1993. He experienced pain in both of his arms, all the way up to his shoulders. Dr. Melhorn was authorized to treat claimant. Eventually, Dr. Melhorn performed surgery on both of claimant’s elbows in 1994. Dr. Melhorn placed restrictions of no work more than 50 hours a week and to avoid activities that would hurt him.

On March 17, 1995, claimant entered into an Agreed Award that provided him future medical and allowed Dr. Melhorn to be the authorized treating physician.

However, claimant continued to have "flare-ups" of his bilateral upper extremities. Claimant's condition would fluctuate causing him to have good days and bad days. When claimant had flare ups he would go to Dr. Melhorn who treated claimant with different forms of treatment, including injections and medication. Dr. Melhorn was able to keep claimant's symptoms at bay with conservative treatment.

After the March 17, 1995 Agreed Award claimant experienced numerous flare-ups. Claimant was seen by Dr. Melhorn on eight (8) occasions in 1996 and ten (10) occasions in 1997. In 1998, respondent refused to authorize further treatment by Dr. Melhorn which precipitated a post award request for medical hearing. After that hearing, the Court entered an order on April 2, 1998, authorizing additional post award treatment by Dr. Melhorn. Since that time claimant has continued to see Dr. Melhorn for periodic flare-ups. In 2000, claimant was seen by Dr. Melhorn seven (7) times, in 2001, ten (10) times and in 2002, claimant was seen nine (9) times.

In September 2003, claimant experienced his worst flare-up ever. This flare-up not only affected his elbows but extended up his arms into his neck. In the months from September through December, 2003, claimant was treated on eight (8) different occasions. Dr. Melhorn's treatment included various modalities such as medication, injections and the use of weights with a personal trainer, with no success. It was at this point that Dr. Melhorn said he could not help claimant any longer and referred claimant to his family physician, Roger Thomas, D.O.

Dr. Thomas treated claimant with pain medications and anti-depressants and recommended claimant see a neurologist. Dr. Thomas related claimant's pain symptoms and depression to the original injury claimant sustained at work with respondent.[3]

Claimant's Application for Post Award Medical requested a "change of physician; referral to a neurologist; treatment for pain and depression; TTD if taken off work."[4] As stated above, Judge Clark ordered Roger Thomas, D.O, as claimant's authorized treating physician and also "to refer [c]laimant to a specialist for his arm and neck problems, but not for treatment for depression."[5]

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[3] Letter from Roger L. Thomas, D.O., To Whom It May Concern (dated April 27, 2004).

[4] K-WC E-4 Application for Post Award Medical (filed April 30, 2004).

[5] Order (July 29, 2004).

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act.[6] In *Jackson*[7] , the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

However, the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*,[8] the Court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*[9] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*[10] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct re-injury of a back sprain that had subsided. The Court, in *Graber,* found that its claimant had suffered a new injury,

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[6] *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

[7] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[8] *Stockman v. Goodyear Tire and Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[9] *Gillig v. Cities Service Gas Co.* 222 Kan. 369, 564 P.2d 548 (1977).

[10] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

Considering that claimant has a clear history of ongoing symptoms and treatment since the date of his original injury and no clear or specific subsequent accident, traumatic event, or acute injury, the Board finds and concludes that claimant's present symptoms and complaints are a direct and natural consequence of his original injury in this docketed claim.

WHEREFORE, the Appeals Board affirms the July 29, 2004 Post Award Order entered by Administrative Law Judge John D. Clark.

IT IS SO ORDERED.

Dated this ____ day of April 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Terry J. Torline, Attorney for Claimant
Richard J. Liby, Attorney for Respondent and St. Paul Fire & Marine Ins. Co.
Richard L. Friedeman, Attorney for Respondent and Granite State Ins. Co.
Crystal M. Nesheim, Kansas Workers Compensation Fund
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director